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Insurance law Case Note

19 August 2014

BRIREK INDUSTRIES PTY LTD V MCKENZIE GROUP CONSULTING (VIC) PTY LTD [2014] VSCA 165

Building actions limitation period issues settled at 10 years by Victorian Court of Appeal.

In a decision which has implications for some other states (Tasmania, Act and NT) the Victorian Court of Appeal has determined that their *Building Act* creates its own limitation regime.

FACTS

Brirek Industries Pty Ltd ("Brirek") retained McKenzie Group Consulting Pty Ltd ("McKenzie") to provide building surveying services for a proposed building on a property in Southbank, Victoria. The property was divided into 4 lots.

Brirek alleged that McKenzie failed to exercise due care and skill and comply with the relevant statutory obligations in execution of their contract, especially with regards to building permits. The proceedings commenced on 5 December 2008 and alleged that the contract was entered into in 2002. Late in the trial Brirek amended its pleadings to plead the date of contract as 2004. The amendment was to be regarded as if commenced on 2 September 2010, not related back to the date of the writ.

It was found that the contract was entered into in 2004.

The main issue that arose on appeal was:

- Whether any of the claims in contract were barred by the applicable statutory limitation period (6 years from the date on which the cause of action accrued) set out in s 5 *Limitation of Actions Act* or if s 134 of the *Building Act* (10 years after the date of issue of the occupancy permit) applies?

DECISION IN FIRST INSTANCE

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Shelton J found that the limitation period that applied was 6 years as provided in s 5(1)(a) of the *Limitation of Actions Act*, and rejected Brirek's contention that s 134 of the *Building Act* altered the limitation period.

Therefore any claim against McKenzie for breach of the 2004 contract was statute barred. The last permit issued by McKenzie was on 27 May 2004, thus all contractual claims were statute barred.

COURT OF APPEAL DECISION

Brirek argued that s 134 of the *Building Act* created a separate limitation regime in respect of 'building actions' (as defined by s 192 of that *Act*) of which this case was an example. It argued that the 10 year limitation period compared to a 6 year limitation period would be a more beneficial interpretation to consumers dealing with latent defects or defects that do not manifest themselves which might develop over an extended period. This, Brirek submitted, was Parliament's intention in enacting s 134.

McKenzie argued that the purpose of the Building Act is to provide a 'long stop' of 10 years from the date of the issue of the occupancy permit for claims in negligence. This is to address situations where a plaintiff does not become aware that is has suffered damage, by reason of negligence, until considerably later that the time when the breach was committed.

The Court of Appeal found in favour of Brirek, in relation to the *Building Act* creating its own limitations regime that stood on its own and was not to be further limited by the *Limitation Act*.

In summary, the court took that view that in the light of the second reading speech and the words of the *Building Act* that section 134 should not be read down as argued by McKenzie.

It is important to note that section 134 does not contain any express limitation that confines its application to matters of contract or in tort, negligence, physical loss/damage or patent/latent defects. The key is if there is a 'building action', which is broadly defined in the *Act*.

COMMENT

In our view the decision by the Victorian Court of Appeal is logical and in keeping with the intent of the *Building Act*. It is likely to be followed when similar legislation is considered in the three other jurisdictions which have similar legislation.

We consider it likely that, in effect for Northern Territory, Tasmania, and the Australian Capital Territory, a 10 year limitation period applies from the date of deemed accrual, in most cases issuing of the occupancy permit to building actions, as now is clearly the case in Victoria. In South Australia, a 10 year time limit applies, their legislation appears clear on its face in this respect.

In New South Wales, Queensland, and Western Australia, the basic time limit of 6 years from accrual applies. However accrual is not deemed to occur at occupancy in those states, and therefore the time limit for claims arising from latent defects, remains indeterminate.

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